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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA	*	
	*	08-cr-128-01-PB
v.	*	November 12, 2008
	*	3:10 p.m.
KURT SANBORN	*	
	*	
* * * * *		

TRANSCRIPT OF WAIVER AND PLEA HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

Appearances:

For the Government:	Robert Kinsella, AUSA U.S. Attorney's Office 53 Pleasant Street Concord, NH 03301
For the Defendant:	Donald A. Kennedy, Esq. Law Office of Donald A. Kennedy 78 West Merrimack Street Manchester, NH 03101
	Alan Baum, Esq. United Defense Group 4181 Sunswept Drive, Suite 100 Studio City, CA 91604
For Probation:	Sean Buckley
Court Reporter:	Diane M. Churas, LCR, CRR Official Court Reporter U.S. District Court 55 Pleasant Street Concord, NH 03301 (603) 225-1442

1 THE DEFENDANT: High school and three years of
2 college.

3 THE COURT: How's your reading?

4 THE DEFENDANT: Very good.

5 THE COURT: Were you able to read the plea
6 agreement that you signed?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: How about the information, the
9 written charge against you? Were you able to read that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Did you discuss both documents
12 with your lawyer?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you feel you understand both
15 documents?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: You have been charged here in an
18 information. You have a right to have this charge
19 presented to the grand jury. A grand jury is comprised
20 of at least 16 and not more than 23 people. The grand
21 jury would hear the evidence against you, and at least
22 12 people would have to find probable cause to believe
23 you committed the crime charged in the information.
24 Otherwise you could not be held for trial on that
25 charge. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: If I allow you to waive your right
3 to indictment, the case will proceed against you on the
4 information just as though you had been indicted. Do
5 you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You've signed a waiver of
8 indictment form. Do you wish to give up your right to
9 have this matter proceed to trial only upon an
10 indictment issued by the grand jury?

11 THE DEFENDANT: Yes.

12 THE COURT: All right. I find that the
13 defendant has knowingly, voluntarily, and intelligently
14 waived his right to have this matter presented to the
15 grand jury. Accordingly, the case will proceed against
16 him on the information just as though he had been
17 indicted.

18 Have you ever been treated for a mental
19 illness?

20 THE DEFENDANT: No, sir.

21 THE COURT: Are you taking any medicine today
22 or are you under the influence of drugs or alcohol?

23 THE DEFENDANT: No, sir.

24 THE COURT: If this case were to go to trial,
25 you would not have to prove your innocence. Instead it

1 would be up to the prosecutor to prove your guilt beyond
2 a reasonable doubt. Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: The prosecutor would have to prove
5 certain things called elements of the offense in order
6 for you to be found guilty. The elements of the offense
7 are described in the plea agreement that you signed.
8 The first thing that the prosecutor would have to prove
9 is that a scheme, an artifice, substantially as charged
10 in the information to obtain money by means of false or
11 fraudulent pretenses existed. Second, he would have to
12 prove that you knowingly and willfully participated in
13 the scheme with an intent to defraud, and third, he
14 would have to prove that the interstate wire
15 communication -- excuse me, that interstate wire
16 communications on or about the dates alleged were used
17 in furtherance of the scheme. Do you understand that
18 all of these things would have to be proved beyond a
19 reasonable doubt at your trial in order for you to be
20 found guilty?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: The government has summarized the
23 evidence it has against you in a statement called,
24 "Offense Conduct" in paragraph three of the plea
25 agreement. Have you read that statement?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Is everything in that statement
3 true?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Are you pleading guilty to this
6 charge because you are in fact guilty of the charge?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You face a possible prison term of
9 up to 20 years, a fine of up to \$250,000, a special
10 assessment of \$100 which will be due at or before the
11 time of sentencing, a possible additional fine to pay
12 the cost to the government of any imprisonment,
13 probation, or supervised release. I'm sorry, I told you
14 the fine was up to 250. It's actually 250 or an amount
15 not greater than twice the gross gain to you or twice
16 the gross loss resulting from your offense, whichever is
17 greater. You also will be required to serve a term of
18 supervised release of not more than five years. If you
19 violate supervised release, you could be sent to prison.
20 You also could be required to make restitution as a part
21 of your offense. Do you understand that these are the
22 possible penalties that you face by pleading guilty to
23 this charge?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Have you discussed with your

1 lawyers how the Sentencing Guidelines may apply in this
2 case?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: When I sentence you I will use the
5 guidelines to determine a guideline sentencing range.
6 That's a range of months. I will then treat the
7 guidelines as advisory. I could sentence you within
8 that range of months, I could sentence you above it, or
9 I could sentence you below it. Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You have entered into certain
12 agreements in the plea agreement. All of those
13 agreements are binding on you. They are all binding on
14 the prosecutor. For the most part they are not binding
15 on me. I don't have to accept most of the agreements in
16 the plea agreement. Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: There is an agreement that is
19 binding on me in a limited sense. There's a stipulation
20 here. It's in paragraph six of the plea agreement, and
21 it is that you and the government agree that the amount
22 of the loss that was caused by your offenses was greater
23 than 200,000, but less than \$400,000. Do you understand
24 that you've entered into this agreement with the
25 government?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: That agreement, unlike the other
3 agreements in the plea agreement, is binding on me in a
4 limited sense. I will wait until the time of sentencing
5 to decide whether I can accept the agreement. If I can
6 accept it, I will go ahead and sentence you in
7 accordance with the agreement. If I can't accept it, I
8 will tell you and I will give you the choice at that
9 time if you want to withdraw from your guilty plea and
10 have your not guilty plea reinstated and have a trial.
11 Do you understand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: That's the only agreement in the
14 plea agreement that's binding on me in this way. As I
15 said, I don't have to follow the other agreements in the
16 plea agreement at all. Do you understand?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: By pleading guilty you're giving
19 up certain constitutional rights that you have. I want
20 to review those rights with you now to make sure you
21 understand them. You have a right to a trial by jury.
22 That would be in front of 12 people. All 12 people
23 would have to find you guilty beyond a reasonable doubt.
24 You wouldn't have to prove your innocence. The
25 prosecutor would have to prove your guilt. You could be

1 represented by counsel at trial. If you could not
2 afford counsel, counsel would be appointed to you at no
3 cost. You could be present during the trial. You could
4 bring witnesses into court and have them testify on your
5 behalf. You could testify yourself if you wanted to.
6 If instead you wanted to remain silent, you could. You
7 could have your lawyer cross-examine any witnesses who
8 testified against you. By pleading guilty you will be
9 giving up all of these rights. If I accept your guilty
10 plea, there won't be a trial. The only thing that will
11 be left is for me to sentence you, and I will determine
12 any facts that are necessary to sentence you. Do you
13 understand all of that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: You are also giving up your right
16 to appeal your conviction and sentence or to challenge
17 it in a collateral review proceeding, any kind of post-
18 appeal challenge to your conviction and sentence. There
19 are some exceptions to that general rule, but if I
20 accept your plea, the general rule will be no appeal, no
21 collateral review. Do you understand?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: The exceptions are you could argue
24 that you were not competent today. You could argue that
25 your lawyer gave you constitutionally ineffective advice

1 when they advised you to plead guilty. You could argue
2 that some new Supreme Court rule that the Court has
3 determined should apply retroactively to you should
4 entitle you to relief. If I give you a sentence that is
5 higher than the one the prosecutor asks, your appeal and
6 collateral review rights will be preserved. Otherwise,
7 no appeal, no collateral review if I accept your plea
8 agreement. Do you understand?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Has anyone threatened you in an
11 effort to get you to plead guilty?

12 THE DEFENDANT: No, sir.

13 THE COURT: Has anyone promised you anything
14 other than the promises contained in the written plea
15 agreement?

16 THE DEFENDANT: No, sir.

17 THE COURT: Are you satisfied with the legal
18 advice you received from your attorney?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Let me ask your counsel. Either
21 of you can answer. Have you advised your client
22 concerning the admissibility of any statements or other
23 evidence the government has against him?

24 MR. BAUM: Alan Baum on behalf of the
25 defendant, your Honor. By the way, my application for

1 admission pro hac vice I believe has been filed, and the
2 clerk is indicating perhaps it's already been approved.

3 THE CLERK: It has.

4 THE COURT: If it hasn't been, it is.

5 MR. BAUM: Thank you, your Honor. I
6 appreciate that. In answer to the Court's question, I
7 do not believe that there is any evidence that the
8 government has or would offer that was obtained
9 illegally, and I have discussed those issues with my
10 client.

11 THE COURT: Do you know of any reason why I
12 should not accept his guilty plea?

13 MR. BAUM: I do not, your Honor.

14 THE COURT: All right. Thank you. Mr.
15 Sanborn, this is the last chance you have to change your
16 mind. Do you feel you've had enough time to think about
17 your decision?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you still wish to plead guilty
20 to the charge?

21 MR. BAUM: Yes, sir.

22 THE COURT: All right. I will take your plea
23 now. You've told me that you've read the charge and
24 understand it, so I won't read it to you again unless
25 you want me to. Do you want me to read it to you again?

1 THE DEFENDANT: That's fine.

2 THE COURT: As to Count 1 of the information
3 charging you with the offense of wire fraud --

4 MR. BUCKLEY: Your Honor, I just wanted to
5 inform the Court and the parties that in looking over
6 the plea agreement, that the maximum term of supervised
7 release for this count is three years, not five years
8 because it's a Class C felony.

9 THE COURT: All right. I appreciate that
10 correction. Unlikely I'd give you more than three years
11 anyway. It's possible, but it's three years according
12 to the probation officer. Thank you. And I appreciate
13 you bringing that to our attention. When you see things
14 like that, I do ask you to speak up.

15 All right. Now, as I've said, you've told me
16 you've read the plea agreement, so I won't read it to
17 you again. I will though ask you as to Count 1 of the
18 information charging you with the offense of wire fraud,
19 how do you plead to that charge, guilty or not guilty?

20 THE DEFENDANT: Guilty, sir.

21 THE COURT: Having questioned the defendant
22 and his counsel on the offered plea of guilty, the
23 defendant and his counsel having informed the Court that
24 they have conferred concerning the offered plea of
25 guilty and all aspects of the charge against the

1 defendant, and any defenses he may have, and the Court
2 having observed the defendant making his answers, his
3 demeanor and manner while answering questions, his
4 apparent intelligence and his attitude, and the Court
5 having observed that the defendant does not appear to be
6 under the influence of any medication, drug, or other
7 substance which may affect his judgment in any manner,
8 the Court finds that the offered plea of guilty of the
9 defendant has a factual basis, is free of any coercive
10 influence of any kind, is competently and voluntarily
11 made with full knowledge of the charge against him and
12 the consequences of his plea, that there have been no
13 promises of any kind made to him by anyone apart from
14 the statements set forth in the written plea agreement
15 which has been filed with the court, and no threats or
16 coercion have been exerted upon him in any manner.

17 I will defer acceptance of the plea agreement
18 until the time of sentencing. Sentencing will take
19 place on February 13th at 9:30. Parties should consult
20 local rules for other dates bearing on the sentencing
21 process.

22 What's the government's position with respect
23 to bail?

24 MR. KINSELLA: Judge, we are unaware of any
25 fact that would indicate that the defendant poses a risk

1 of flight or danger to the community, and so we are
2 requesting he be released on his personal recognizance.

3 THE COURT: And the probation officer does not
4 disagree I assume?

5 MR. BUCKLEY: No, your Honor.

6 THE COURT: Based on the government's
7 recommendation, I will allow the defendant to remain
8 free on personal recognizance pending sentencing.

9 I see you are employed in Boxborough. I have
10 family in that area. I just want to be sure, you don't
11 know any Barbadoros, do you?

12 THE DEFENDANT: No.

13 THE COURT: If I had a conflict issue, I'd
14 want to get it out of the way now.

15 Okay. Anything else?

16 MR. BAUM: Your Honor, the PSA report does
17 recommend that he be on unsupervised pretrial, and I
18 would ask the Court to make that part of its order.

19 THE COURT: Well, personal recognizance
20 release here, as we understand it, is essentially that.
21 Isn't it?

22 MR. BUCKLEY: Not necessarily. A person with
23 no bail, sometimes they do impose supervision to follow.
24 In this case we are asking for no supervision to follow,
25 just to impose three conditions.

1 THE COURT: What are the three conditions?

2 MR. BUCKLEY: That he refrain from possessing
3 a firearm, destructive device, or other dangerous
4 weapon, that he turn in any firearms to the clerk, his
5 address, and obtain no passport.

6 THE COURT: Do you agree with those?

7 MR. KINSELLA: I do, Judge.

8 THE COURT: Do you agree with those?

9 MR. BAUM: I do, your Honor, and also I
10 believe pretrial is recommending that he be allowed to
11 travel throughout the United States without prior
12 permission.

13 THE COURT: All right. He will be allowed to
14 be released subject only to those three conditions that
15 you've identified.

16 MR. BUCKLEY: Thank you, your Honor.

17 MR. BAUM: Thank you, your Honor.

18 (Adjourned at 3:30 p.m.)

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C E R T I F I C A T E

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I, Diane M. Churas, do hereby certify that the

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foregoing transcript is a true and accurate

6

transcription of the within proceedings, to the best of

7

my knowledge, skill, ability and belief.

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Submitted: 6/24/10

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/s/ Diane M. Churas
DIANE M. CHURAS, LCR, CRR

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